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# In the Supreme Court of the United States

OCTOBER TERM, 1974

No. ~~74~~ 74-1234

UNITED STATES OF AMERICA

v.

MANUEL GLENN ABASCAL

## Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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# In the Supreme Court of the United States

OCTOBER TERM, 1974

No. . . . . .

UNITED STATES OF AMERICA,
*Respondent-Appellee.*

v.

MANUEL GLENN ABASCAL,
*Petitioner-Appellant.*

## On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## Petition for Writ of Certiorari

The petitioner Manuel Glenn Abascal respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on January 9, 1975, rehearing of which was denied on February 27, 1975.

### OPINIONS BELOW

Certificate of Contempt, pursuant to Rule 42(a), appears as Appendix A attached hereto. The opinion of the United States Court of Appeals for the Ninth Circuit, affirming,

appears as Appendix B. A copy of the order denying the petition for a rehearing entered herein on February 27, 1975 appears as Appendix C. All of the foregoing are as yet unreported.

## JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 9, 1975. A timely petition for rehearing was filed and was denied on February 27, 1975. The mandate of the Ninth Circuit has been stayed by that Court, see Appendix D attached, pending the filing and final disposition of this petition for writ of certiorari through and including March 26, 1975*. This Court's jurisdiction is invoked under 28 U.S.C., § 1254 (1).

## QUESTIONS PRESENTED

Was the petitioner deprived of due process of law by the failure of the trial judge to issue petitioner, who was seated quietly in the courtroom and not expecting to be addressed by the trial judge, a prior warning that petitioner's failure to step forward upon the command of the trial judge would be punished criminally?

Was the petitioner's conditional and respectfully asserted refusal to step forward without his retained counsel upon the command of the trial judge, just moments before the trial judge exited the courtroom for the luncheon recess, a material obstruction of justice which could be summarily punished under 18 U.S.C., § 401(1)?

Was the Court of Appeals correct in its holding that petitioner's conviction for contempt of court could be upheld even though the trial judge incorrectly proceeded under

* The March 26, 1975 date is incorrect. The date should have been March 29, 1975 — thirty days from the denial of the petition for rehearing, February 27. The Clerk of that Court has been notified of the error and time for notifying the Court of the docketing of this petition extended accordingly.

Rule 42(a), when petitioner's conviction rests in its entirety or partly upon the biased opinions of the trial judge that petitioner was "slouched" in his seat, and where petitioner has never had an opportunity to challenge the correctness of the trial judge's description?

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment, United States Constitution: ". . . no person shall be deprived of life, liberty or property without due process of law . . . ."

## STATUTES AND RULES INVOLVED

18 USC §401 empowers Federal Courts ". . . to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; . . ."

Rule 42 (a), Federal Rules of Criminal Procedure, provides:

"SUMMARY DISPOSITION: A criminal contempt may be punished summarily if the judge certified that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court."

Rule 42 (b):

"A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such."

## STATEMENT OF THE CASE

Petitioner, MANUEL GLENN ABASCAL, was indicted with eight others on March 16, 1973. The indictment is in six counts. Petitioner was named in count one, charging an alleged conspiracy to violate 21 U.S.C.,§ 841, 846,952, 960 and 963, and in count six, charging a violation of 21 U.S.C., § 846 and 963; offenses charging importation, possession and distribution of controlled substances.

On June 20, 1974, petitioner was present in court in San Diego. He had accompanied his counsel, who, by order of the district court judge, was required to be present with members of counsel's staff while the recordation of data in the Clerk's Office of the District Court was being done on the prospective jury challenge on behalf of petitioner.

A hearing was in progress on behalf of one of petitioner's co-defendants in the alleged conspiracy, and petitioner ABASCAL was in the courtroom observing, while his counsel was in the Clerk's Office.

The facts out of which the alleged contempt arose are uncontradicted and are as follows:

THE COURT: At this time we will take our noon recess. We will be in recess now because I have a conference in another case at one-thirty. We will be in recess now until two o'clock, two o'clock this afternoon.

MR. EISENBERG: Your honor, the previous admonition that we've had regarding the government and Sheriff De Puy, may remain in effect?

THE COURT: Yes.

MR. FANNING: No problem, your honor.

THE CLERK: All rise.

THE COURT: Mr. Abascal, would you step forward, please?

DEFENDANT ABASCAL: (No response)

THE COURT: Step forward please.

DEFENDANT ABASCAL: Not without my counsel, sir.

THE COURT: Mr. Cecil, he's in contempt of court. I've told him to step forward. He has refused to get out of his seat. Put him in jail." (App. A at 2).

Petitioner was placed in custody of the United States Marshalls and was returned to the courtroom at 4:30 p.m., on June 20, 1974. (R.T. 5-9).* The district court judge at that time explained his reasons for having commanded MR. ABASCAL to "step forward." The judge then indicated that at the midmorning recess he had observed that Mr. ABASCAL had not stood up when the Clerk ordered "All rise", as the judge left the bench. (Appendix B, at 5). The judge had directed his secretary to prepare a statement which he intended to read to MR. ABASCAL about his conduct when he had ordered him to step forward, "had he seen fit to do so". (R.T. 3-5).

MR. BRITTAIN, counsel for petitioner, was apprised that petitioner was adjudged in contempt of court pursuant to Rule 42(a). (R.T. 5-6). Counsel challenged the jurisdiction of the district court judge to convict summarily; he pointed out that the adjudication of contempt was void because the judge had not warned MR. ABASCAL that his conduct would be punished criminally (R.T. 6) and called the district judge's attention to the decision of this Court in *Bitter v. United States*, 389 US 15 (1967), which requires a warning as a condition precedent, when practicable, to a summary commitment. (R.T. 6). Counsel also made the observation that other sanctions were available and that the evidence failed to show an "actual and material" obstruction to the administration of justice, as opposed to a subjective personal slight to the presiding judge. (R.T. 6-7).

Petitioner, only then aware of what the intentions of the judge had been, explained he intended no disrespect to the

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* R.T. refers to Reporter's Official Transcript of Proceedings.

court. He emphasized that at the time of the alleged contempt he merely "required or requested" for his "fundamental legal right" to have his counsel present to be indulged before he was "brought up in front of the Court". (R.T. 9).

The Honorable GORDON THOMPSON, JR., then proceeded to pronounce sentence. Petitioner was remanded to the custody of the Attorney General for ninety (90) days, stating he found petitioner guilty of "insolent behavior" which "interfered with the judicial process in that it was a direct affront to the dignity of this court." (R.T. 10). The Certificate of Contempt, entered the following date reiterated the district court judge's view of petitioner's conduct. (Appendix A). The motion for a stay of the sentence pending appeal was denied, as was the motion for bail pending appeal. (R.T. 11-12). Petitioner was released on July 2, 1974, on order from the Circuit Court.

On appeal to the Ninth Circuit Court of Appeals, petitioner raised the following issues and contentions:

> (1) His refusal to step forward when requested by the court at the noon recess did not interfere with the administration of justice and therefore was not contemptuous; (2) the court should have warned him that his conduct could subject him to criminal penalties; (3) the summary contempt procedure of Rule 42 (a) was inappropriate; and (4) there was a likelihood of prejudice on the part of the trial judge rendering him unable to fairly adjudicate the matter of appellant's contempt. (App. B, at 6).

In affirming the contempt citation, the Ninth Circuit concluded "that petitioner's refusal to step forward combined with his apparent disrespect for the court as manifested by his courtroom demeanor constituted an obstruction to the administration of justice punishable under 18 U.S.C., § 401". *Ibid* at 5. The demeanor referred to is that petitioner "remained slouched in his seat."

Although finding that petitioner's behavior was "contemptuous and punishable under 18 U.S.C.,§ 401," the Ninth Circuit found that it "did not constitute 'exceptional circumstances' requiring 'immediate penal vindication of the dignity of the Court' pursuant to Rule 42 (a)" (App. B,at 13) and that "the sentence imposed was excessive." *Ibid.* Nevertheless, the Ninth Circuit did not overturn the conviction but instead remanded the case for vacation of the remainder of the sentence. Relying on the ABA Standards for Criminal Justice, Function of the Trial Judge, Section 712, the Ninth Circuit determined that, although "a warning would have been appropriate, we cannot hold that the failure to warn constituted reversible error" (App. B, at 8).

## REASONS FOR GRANTING THE WRIT

### I It Is Important For this Court to Firmly Establish That the Trial Judge's Total Failure to Warn Petitioner That Petitioner's Peaceful and Respectful Conduct Would Be Punished Criminally Deprived Petitioner Due Process of Law in Violation of The Fifth Amendment, United States Constitution.

Without any warning or advance notice whatsoever, petitioner was summarily charged, tried, convicted, and jailed for a federal offense. "Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both" *Bloom v. Illinois,* 391 U.S. 194, at 201 (1968). Criminal contempt is an integral part of the federal penal code. See 18 U.S.C.,§401(1), *supra.*

Until the trial judge ordered MR. CECIL to jail him, petitioner had no idea that his conduct would be punished criminally. (App. A, at 2). Petitioner was not an "activist seeking combat." He was not "hurling epithets" at the trial judge; nor had he turned the "courtroom into bedlam". See *Mayberry v. Pennsylvania,* 400 U.S. 453 (1971). Petitioner

was quietly seated, observing the proceedings. This case provides the Court an opportunity to determine whether a warning is Constitutionally required before such conduct may be summarily converted into a crime.[1]

In *Taylor v. Hayes*, . . . U.S. . . ., 94 S Ct. 2697, 42 US LW 5180 (June 26, 1974), This Court held that when a contempt adjudication occurs after the completion of the trial, the contemner is entitled to notice and an opportunity to be heard. Such procedures were considered essential to contempt proceedings due to "the heightened potential for abuse posed by the contempt power", 42 USLW, at 5184. The contemner was accorded these "fundamental due process protections", because contemner "facing a jail sentence his 'liberty [is] valuable and must be seen as within the protection of the Fourteenth Amendment'." *Ibid.* In the context of the contempt adjudication during the trial, a warning is Constitutionally apropos. A warning would provide "some orderly process, however informal" to the contemner and accord him with some measure of "elementary fairness" before his liberty could be summarily terminated. *Ibid.*

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1 This Court and numerous federal courts have considered warnings to be essential to their holdings in contempt cases, but no court has yet required a warning as a matter of federal Constitutional law. Warnings were given in each of the following cases: *Sacher v. United States*, 341 U.S. 1, at 10-11 (1952), aff'g. 182 F. 2d 416, at 459 (2nd Cir., 1950); *United States v. Green*, 176 F. 2d 169 (2nd Cir., 1948); *cert. denied* 388 U.S. 851 (1949); *Offutt v. United States*, 348 U.S. 11, at 12 (1954); *United States v. Dennis*, 183 F. 2d 201, at 224 (2nd Cir., 1950); *United States v. Rinieri*, 308 F. 2d 24 (2nd Cir., 1962) *cert. denied*, 371 U.S. 935 (1962); *United States v. Bollenbach*, 125 F. 2d 458 (2nd Cir., 1942); *Johnson v. United States*, 344 F. 2nd 401 (5th Cir., 1965); *United States v. Sternman*, 415 F.2d 1165, at 1167,1170 (6th Cir., 1969); *In re Atterbury*, 316 F. 2d 106, at 107 (6th Cir., 1963); *Appeal of the United States Securities and Exchange Commission*, 226 F. 2d 501 (6th Cir., 1955); *Sibley v. United States*, 236 F. 2d 234 (9th Cir., 1956) *cert. denied*, 352 U.S. 922 (1956); *Wong Gim Ying v. United States*, 231 F. 2d 776, at 778 (DC Cir., 1956); and *United States v. Piccolo*, 395 F. Supp. 955 (D.C. Conn., 1967), *Brown v. United States*, 356 U.S. 148 (1958).

In *Bitter v. United States, supra,* the defendant had been given permission to leave the court and go to his office to gather evidence for his defense. The defendant was 37 minutes late returning to court. The trial judge summarily committed the defendant to custody for the remainder of the trial. The Court reversed the conviction, stating: "Without warning, hearing, or explanation, the trial judge ordered petitioner into custody for the balance of the trial." 389 U.S., at 16. The Court noted that the summary commitment "had the appearance and effect of punishment rather than of an order designed solely to facilitate the trial" *Ibid.* The Court added an admonition that, "Punishment may not be so inflicted," and cited Rule 42, FRCrP, governing the contempt power. *Ibid.* Thus, this Court has clearly held that summary commitment during trial, as punishment for disobedience to a court order, was invalid in the absence of a warning.

In *Illinois v. Allen,* 397 U.S. 337 (1971). This Court held that a disruptive defendant might be removed from his own trial. The necessity for a warning was crucial to the Court's holding. Mr. Justice Black stressed the fact that Allen had been repeatedly warned by the trial judge that he would be removed from the courtroom if he persisted in his unruly conduct, 397 U.S., at 346. Mr. Justice Brennan, concurring, further emphasized that "no action against an unruly defendant is permissible except after he has been fully and fairly warned . . . that his conduct is wrong and intolerable and warned of the possible consequences of continued misbehavior." 397 U.S., at 350.

As a bare minimum, due process requires that an adjudication of contempt be preceded by a warning. A prior warning would aid trial judges and appellate courts in their effort to restrict the contempt power "to the bedrock cases where concession of drastic power to the courts is necessary to enable them to preserve their authority and to insure the maintenance of order and decorum in the proceedings before them." *Farese v. United States,* 209 F. 2d 312, at 315 (1st Cir., 1954).

A warning requirement would allow only those cases to be prosecuted where invocation of the contempt power was absolutely necessary to prevent an obstruction of justice and to vindicate the dignity of the court. Conceivably a person who has been warned that his conduct may be punished criminally would refrain from further misbehavior. Thus, a warning would enhance the deterrence value of the contempt power and encourage voluntary compliance with court orders and self-discipline.

A warning requirement would cure the vice of vagueness and overbreadth in the statute. Section 401(1) prohibits 'Misbehavior.' The term is an extremely vague and broad one. (Consider *Gooding v. Wilson*, 405 U.S. 518 (1972), involving Georgia's opprobrious language statute on overbreadth grounds.)

The gloss frequently placed on Section 401 (1), that it applies only to "misbehavior which obstructs the administration of justice", adds neither precision nor clarity to the statute. "Obstruction to the administration of justice" is obviously a rather vague and overinclusive phrase. Without a warning, that phrase could reasonably be construed to forbid the "doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application and thus to violate the first essential of due process." *Connally v. General Const. Co.*, 269 U.S. 385, at 391 (1961).

A warning however would place the contemner on notice that his conduct will no longer be tolerated. A warning would facilitate the intelligent exercise of the broad review power accorded federal courts in contempt cases. A line of demarcation could be precisely determined with respect to innocent and guilty conduct.[2] The post-warning conduct would invariably constitute the evidence on which the contempt conviction would be based.

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2. See *Green v. United States*, 356 U.S. 165(1957); *Note*, 109 U. Pa L. Rev. 67, at 80 n. 72 (1960).

A warning prevents a summary contempt conviction from resting entirely or partially upon the virtually unassailable opinions of the trial judge, describing the courtroom demeanor of the contemner. The certificate filed by the trial judge, pursuant to Rule 42(a), FRCrP, recited that, "the acts and demeanor of the [petitioner] in twice refusing to step forward and willfully remaining *slouched* in his seat while being personally addressed to be a direct and deliberate confrontation with this court." (App. A, at 2-3). (Emphasis added). The trial judge referred to alleged *"hostility and discourtesy"* generated in the courtroom. *Ibid.* at 2. (Emphasis added).

Justice Traynor, in *Gallagher v. Municipal Court*, 31C. 2d 784 (1948), perceived a *warning* to be a cure for this exact vice. There, the trial judge, who pursuant to California Code of Civil Procedure, § 1211 is required to file an order comparable to a Rule 42(a) certificate, described the defendant's tone of voice as having been "loud, insolent, aggressive, belligerant, boisterous, harsh, offensive" and had a "sneering contemptuous expression" on his face, 31 C2d, 796-97. In response to those recitals of misconduct, Justice Traynor observed:

> "If the words used by counsel are respectful and pertinent to the matter before the court, it is not unnecessarily burdensome to require the judge *first to warn* the attorney that his tone and facial expressions are offensive and tend to interrupt the due course of the proceedings. Otherwise, attorneys could be subjected to fines and jail sentences because of personal annoyance and pique on the part of trial judges; *and these penalties could be rendered unassailable, as is contended here, by lengthy recitals in the orders of contempts respecting the demeanor of the contemner.*" 31 C. 2d, 797. (Emphasis added.)

The trial judge failed to warn petitioner that his tone of voice or choice of words were offensive. The trial judge also failed to warn petitioner that he would consider his refusal

to step forward to be insolent or that he disapproved of petitioner's posture. Thus, it is clear that the failure to warn petitioner his conduct would subject him to criminal punishment deprived him of due process of law.

The Ninth Circuit distinguished its own prior decisions in *Yates v. United States*, 227 F.2d 848, at 851 (9th Cir., 1955); and *Dashbach v. United States*, 254 F. 2d 687, 692 (9th Cir., 1958), in which summary comtempt convictions were reversed, because a "prior positive notification" was not given the contemners that "criminal penalties in addition to the civil contempt measures might be imposed for their failure to answer." (App. B, at 7, fn. 2). The Ninth Circuit decided that "a warning would have been appropriate", but refused to hold that failure to do so constituted reversible error. The Ninth Circuit approved Section 712, the ABA Standards for Criminal Justice, Function of the Trial Judge, which requires "a clear warning" that conduct is improper before the contempt sactions may be imposed[3] The failure of the Ninth Circuit to apply its own cases to this case is such a departure from law that this Court should grant certiorari in the exercise of its supervisory power and summarily reverse petitioner's conviction.

## II. It Is Important For This Court To Firmly Establish, By Reversing The Judgment Below, That The Exercise Of The Summary Contempt Power Is Only Appropriate When There Is An Actual And Material Obstruction Of Justice, And Not Merely An Affront To The Trial Judge's Sensibilities.

### A. No Actual And Material Obstruction of The Administration of Justice Occurred.

In the record of this case, there is no evidence to show beyond a reasonable doubt that petitioner's conduct resulted in an actual "obstruction to the performance of a judicial duty". The court was in recess when the alleged misconduct occurred (App. B, at 10). The judge was "leaving the bench". *Ibid.* The trial judge's attention returned to the

3. See App. B, at 8, fn. 4.

courtroom due to the perfunctory inquiry of counsel for a co-defendant, as to whether the admonitions to a witness were still in effect (App. B, at 5). All the concerned parties readily agreed that the admonitions were still effective (App. A, at 2). At that point, the trial judge noticed that petitioner was seated and apparently had not stood in response to the ceremonial order, "All rise".

The record does not reflect the rapidity with which the district court judge first commanded petitioner to step forward and then summarily convicted him. However, it would be reasonable to infer that only a few seconds elapsed at best.

The decision below is contrary to controlling decisions of this Court. *Ex parte Hudgings*, 249 U.S. 378 (1919); *In re Michael*, 326 U.S. 224 (1954); and *In re McConnell*, 370 U.S. 230 (1962). Even though there was no objective evidence that petitioner's conduct actually obstructed the administration of justice, the Ninth Circuit upheld petitioner's conviction. The Court of Appeals stated that petitioner's "refusal to step forward combined with his apparent disrespect for the court as manifested by his courtroom demeanor constituted an obstruction to the administration of justice punishable under 18 United States Code, §401." (App. B, at 7). In an unbroken line of decisions stretching over a half century or more, This Court has held that a criminal conviction for contempt must rest upon an actual, not a theoretical, obstruction which "must clearly be shown in every case where the power to punish for contempt is exerted. . ." *Ex parte Hudgings, supra*, at 383.

Petitioner's case is indistinguishable in principle and factually stronger than any of the just cited cases.

*Ex parte Hudgings, supra*, involved a trial witness who was reluctant to testify that he had actually observed persons write their respective names. The trial judge disbelieved the witness' disclaimer of personal knowledge and interrogated the witness himself but to no avail. The witness was persistent in his disclaimer and provoked the judge to

*interrupt the trial* and summarily commit the witness for contempt of court. 249 U.S., at 381.

This Court reversed the contempt conviction because there was *no* evidence to show *an actual* obstruction of justice. The Court stated:

> "An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, *it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted* — a principle which, applied to the subject in hand, exacts that in order to punish perjury in the presence of the court as a contempt there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty. (Citation omitted) It is true that there are decided cases which treat perjury, without any other element, as adequate to sustain a punishment for contempt. *But the mistake is, we think, evident, since it either overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing.* If the conception were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully the power would result to impose a punishment for contempt with the object or purpose of exacting from the witness a character of testimony which the court would deem to be truthful; and thus it come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in a court would be gravely imperiled." 249 U.S. at 383-84. (Emphasis added).

*In re Michael, supra,* dealt with a witness who had given perjured testimony before a grand jury. The District Court found that Michael's testimony "was of a type tending to block the inquiry and consequently, 'an obstruction of the administration of justice. . .' " 326 U.S., at 225. The Circuit Court, while finding that Michael had not been "contumacious or obstreperous", accepted the District Court's finding that his conduct had obstructed justice. *Ibid.* Relying upon *Ex parte Hudgings, supra,* this Court reversed. Perjury alone was insufficient to constitute an actual obstruction of justice, Mr. Justice Black held for a unanimous Court, 326 U.S. at 228-29.

*In re McConnell, supra,* involved a lawyer who testily threatened to continue questioning a witness, after the trial judge had ordered him to stop, "unless some bailiff stops us", 370 U.S., at 235. This Court noted that the "bailiff never had to interrupt the trial by arresting petitioner" and held that McConnell's conduct could not amount to a contempt of court, unless it "in some way [created] an obstruction which [blocked] the judge in the performance of his judicial duty." 370 U.S., at 236.

The decision and judgment of the Ninth Circuit provides the same ominous potential for oppression and wrong as confronted the litigants in *Ex parte Hudgins, supra; In re Michael, supra;* and *In re McConnell, supra.* Unless corrected by this Court, lower federal courts will be permitted to invoke the summary contempt power on the basis of nothing other than the trial judge's *subjective reaction* to a person's posture or failure to respond to an order with military-like alacrity. Court orders not only should be, but they must be obeyed. Still, our courtrooms are not drill fields, and our trial judges are not supposed to be drill sergeants. Only disobedience which *actually* obstructs the administration of justice may be punished as a criminal contempt. The courts below failed to observe this essential distinction, which has been drawn by this Court in a long and unbroken line of precedents, and, therefore, erred by affirming petitioner's contempt conviction.

### B. The Record Shows That Petitioner's Failure To Step Forward Was For A Meritorious Reason And Other Less Drastic Remedies Were Available Which Made Summary Contempt Inappropriate.

Petitioner refused to step forward solely because his counsel was not present. The desire to have his counsel present would only justify the contempt conviction if it were asserted in bad faith. See *Maness v. Meyers*, 43 US LW 4143, No. 73-689 (decided January 15, 1975). Petitioner's statement that he could not step forward without counsel was sufficient to alert the trial judge that petitioner was not waiving the right to counsel and was requesting the presence of counsel to advise him fully as to whatever matters the trial judge was intending to take up with him. Petitioner's counsel was on the scene and in a position to afford petitioner the protection he desired without any undue delay of the proceedings.

This Court has recognized that the power of summary contempt may be used to assure the orderly continuation of the trial or proceedings only after less drastic remedies have been tried. This restriction on the use of the summary contempt power gives life to the principle that the contempt power must be limited to "the least possible power adequate to the end proposed". *Anderson v. Dunn*, 6 Wheat. 204, 231 (1821).

It results in both a limitation on the scope of Section 401 (1), 18 United States Code, and the occasions when it may properly be invoked as well. As This Court has said:

"This doctrine further requires that the trial judge consider the feasibility of . . . the imposition of criminal contempt. The judge should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate." *Shillitani v. United States*, 384 U.S. 364, 371, fn 9 (1966).

In holding that other less drastic remedies must be first considered before the sanction of criminal contempt may be imposed, the Court was adopting the view which had been expressed by Mr. Justice Brennan in his dissent in *Brown v. United States*, 356 U.S. 148, 163 (1958):

> "... I think that in contempts, as in other areas of the law, penal sanctions should be used sparingly and only where coercive devices less harsh in their effect would be unavailing. In other words, there is a duty on the part of the district judges not to exercise the criminal contempt power without first having considered the feasibility of the alternative at hand".

There were numerous less drastic and constitutionally desirable and effective alternatives other than summary contempt — *the least of which is a verbal warning that specific conduct is prohibited.* The failure of the district court judge to resort to any alternative short of summary contempt resulted in a needless[4] and dangerous expansion of the summary contempt powers.

### C. The Contempt Adjudication Results From An Apparent Confusion Of The Sensibilities Of The Trial Judge With An Obstruction Of Justice.

The decision below is contrary to decisions of this Court which have cautioned judges "against confusing offenses to their sensibilities with obstruction to the administration of justice." *Brown v. United States*, 356 U.S. 148, at 153 (1958); *Offutt v. United States*, 348 U.S. 11, at 14 (1954); and *Craig v. Harney*, 331 U.S. 224 (1945). The Ninth Circuit clearly confused an affront to the trial judge's sensibilities with an obstruction to justice.

4. 'Needless' is used here to mean "the absence of necessity" which petitioner defines to mean clearly indispensible, not merely convenient or desirable. See *Green v. United States, supra*, at p213 (dissenting opinion of Mr. Justice Black).

Petitioner's conviction was sustained on the basis that his "refusal to step forward combined with his apparent disrespect for the court manifested by his courtroom demeanor constituted an obstruction to the administration of justice. . ." (App. B, at 7). The "courtroom demeanor" to which the Ninth Circuit refers, "willfully remaining slouched in his seat while being personally addressed" by the trial judge, was not found by the trial judge to have been an actual obstruction of justice (App. A, at 2). The trial judge found petitioner's conduct to have been "a direct and deliberate confrontation with this court" (App. A, at 2). The trial judge never found that petitioner's alleged conduct constituted "an obstruction of justice".

The trial judge's descriptive opinions of petitioner's posture reveal personal embroilment and pique. The trial judge perceived petitioner's act of quietly sitting in his chair as an attack on his ability to control the courtroom. The trial judge's annoyance is revealed by his statement, unsupported by reference to any objective facts, that the record is inadequate to "reflect the true intensity of the hostility and discourtesy that the [petitioner's] behavior generated in this court's presence". (App. A, at 2). This statement shows without a doubt that the trial judge was personally offended, because, for a few seconds during rather protracted pre-trial proceedings, petitioner did not exhibit a deferential attitude towards him. However, "[t]he law of contempt is not made for the protection of judges who may be sensitive. . . . Judges are supposed to be men of fortitude able to thrive in a hardy climate." *Craig v. Harney*, 331 U.S., at 376.

**D. Certiorari Should Be Granted To Resolve Conflict Between The Circuits As To Whether A Failure To Obey A Court Order Which Does Not Result In An Actual And Material Obstruction Of The Administration Of Justice May Be Punished As A Summary Contempt.**

This court should grant certiorari to resolve conflicts between the circuits. The Fourth and Seventh Circuits have held that the failure to comply with a formal or ceremonial order, alone, cannot support a summary contempt conviction under Section 401(1), 18 United States Code. *United States, v. Snider,* 502 F. 2d 645 (4th Cir., 1974); and *In re Dellinger,* 461 F. 2d 389, at 401 (7th Cir., 1972), aff'd after remand, *sub. nom., Dellinger v. United States,* 502 F. 2d 813, cert. pending, No. 74-714, filed December 9, 1974, 43 USLW 3439 (1975).

The conflict is stronger between the Fourth and Ninth Circuits. In *United States v. Snider, supra,* the Fourth Circuit held that:

> "We are thus led to the conclusion, and so hold, that the mere failure to rise upon command of the marshal in a United States courtroom is not misbehaviior within the meaning of 18 U.S.C.,Sec.401 and does not constitute criminal contempt of court. To so hold will not, we think, tend to diminish respect for the judiciary and for the administration of justice. We do not envision, as the result of our decision today, disorder flourishing in the courtroom. Instead, we anticipate the custom of rising upon the convening and adjournment of court will continue and become more significant because wholly voluntary". 502 F. 2d, at 661.

The Ninth Circuit would avoid the conflict between it and the Fourth and Seventh Circuits by distinguishing this case on its facts. Referring to the conflict with *In re Dellinger, supra,* the Ninth Circuit stated:

"Here we are concerned with more than merely the observance of the formality of rising at the end of a court session. [Petitioner] defied a clear order directed to him personally by the court. The ability of a trial judge to compel obedience to his orders is fundamental to the proper functioning of our system of justice. Whether a person be directly involved in a judicial proceeding or simply a spectator, he is subject to all reasonable orders of the court, even those given at the end of a court session" (App. B, at 7).

The Ninth Circuit failed to distinguish between orders which are essential to the proper functioning of the court and those which are non-essential. It was not essential for petitioner to "step forward" for the trial judge to have read his statement to him. That purpose could have been accomplished whether or not petitioner sat in place or stood in place. It might, indeed, have comported with our sensibilities as to what conduct constitutes proper decorum in a courtroom for petitioner to have stepped forward; however, his failure to do so could not reasonably be deemed a material obstruction of justice.

On the facts of this case, petitioner's conviction has an ugly twist. It seems as though the trial judge purposefully set the stage for a contempt adjudication and pursued a planned course of action to achieve his objective. Compare *Cooper v. Superior Court*, 55 Cal. 2d 291, at 302, 10 Cal Rptr. 842 (1961). The trial judge acted unreasonably by ordering petitioner to step forward. The asserted purpose of requesting petitioner to step forward was to deliver a message to him in the *absence* of his counsel about his failure to rise. The trial judge's conduct borders on entrapment and was clearly injudicious, as is indicated by the prior preparation of a specific warning to be read to petitioner. Chief Justice Burger has observed: "Every judge must remember that no matter what the provocation, the judicial response must be a judicious response and that no one more surely sets the tone and the pattern for courtroom conduct

than the presider." Burger, "The Necessity for Civility," 52 F.R.D. 211, at 215.

The decision in this case is in conflict with other decisions of the Ninth and Seventh Circuits. In *Comstock v. United States*, 419 F. 2d 1128 (9th Cir., 1969), the Ninth Circuit confirmed a summary contempt conviction in which there was a *merger* of a failure to rise and other clearly disruptive misbehavior. There, the defendant was personally admonished by the trial judge to rise. The defendant refused. The trial judge then personally directed the defendant to approach the bench, and he again refused to comply. When a Marshal attempted to escort the defendant to the bench, he resisted and prostrated himself on the courtroom floor, as the trial judge addressed him. 419 F. 2d, at 1131.

The Seventh Circuit likewise requires a *merger* of a failure to rise and evidence of "some disturbance, disorder or interruption. . ." *United States ex rel Robson v. Malone*, 412 F. 2d 848 (7th Cir., 1969); and *In re Chase*, 468 F. 2d 128 (7th Cir., 1972).

This case differs from any of the reported cases because it permits a summary conviction for contempt to rest on a mere failure to rise or step forward, since petitioner could hardly have stepped forward without rising, and conclusionary statements in the form of a highly opinionated description of petitioner's posture. Neither the Court of Appeals nor the trial judge articulate any fact which shows that petitioner's conduct "in any wise disrupted the court proceeding." *In re Larry Little*, 404 U.S. 553, at 555 (1972). The reason neither court was able to do so is very simple: there was nothing going on in the district court to disrupt since Court was in recess.[5]

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5. In *United States v. Seale*, 461 F. 2d 345, at 369 (7th Cir., 1972), the Seventh Circuit held that the obstruction resulting from failure to obey a court order had to be "material" and "not merely any interruption" of the court. See also *U.S. ex. rel. Robson v. Oliver*, 470 F. 2d 11, at 14 (7th Cir., 1974). The Second Circuit requires an open threat to orderly procedure and flagrant defiance. *United States v. Mara*, 482 F. 2d 1196, at 1201 (2nd Cir., 1973). In the Sixth Circuit evidence of reckless disre-

## III The Supervisory Power Of This Court Should Be Exercised To Correct The Decision Of The Ninth Circuit Which Upholds Petitioner's Conviction Even Though That Court Ruled That Petitioner Was Improperly Proceeded Against Under Rule 42(a), FRCrP, Where The Conviction Depends Upon The Correctness Of The Trial Judge's Characterization Of Petitioner's Courtroom Posture.

The Ninth Circuit held that petitioner's conduct "did not constitute 'exceptional circumstances' requiring 'immediate penal vindication of dignity of the court' pursuant to Rule 42(a). . ." (App. B, at 13).[6] However, the court below nevertheless affirmed petitioner's contempt conviction. This was plain error which this Court should correct by the exercise of its supervisory power.

Petitioner's conviction rests in part upon the fact findings of the trial judge who, for purposes of the contempt power, was also a witness against petitioner. The Ninth Circuit held that petitioner had committed a punishable act of contempt by his refusal to step forward "combined with his apparent disrespect for the court as manifested by his courtroom demeanor. . ." (App. B, at 7). Thus, it is clear that petitioner's conviction rests upon "facts" or perhaps the opinion of his accuser that his conduct was improper, which petitioner has not had an opportunity to challenge. Under the procedures called for under Rule 42(b), FRCrP, peti-

Footnote 5 continues --

gard for a court order or persistence is necessary to show the commission of a criminal contempt. *United States v. Belahanty*, 488 F. 2d 396 (6th Cir., 1973); *United States v. Seavers*, 472 F. 2d 607 (6th Cir., 1973); and *United States v. Schiffer* 351 F. 2d 91, at 95 (6th Cir., 1965). The District of Columbia Circuit likewise requires evidence of reckless disregard. *In re Nieback*, 476 F. 2d 930 (DC Cir., 1973); and *United States v. Meyer*, 462 F. 2d 827 (DC Cir., 1972).

6 Petitioner need not dwell on the validity or invalidity of a Rule 42(a) adjudication. The Court has recently heard arguments on that very question. *United States v. Wilson*, No. 73-1162, 43 USLW 3371 (January 7, 1975), argument heard December 17, 1974; certiorari granted to review 488 F. 2d 1231 (2nd Cir., 1973).

tioner would at the very least be allowed to file affidavits which could challenge the trial judge's opinion respecting petitioner's courtroom demeanor. Further, the decision of the Ninth Circuit deprives petitioner of the benefit of the decision of this Court in *Taylor v Hayes, supra,* providing for prior notice and an opportunity to be heard. Petitioner's case was on appeal when *Taylor v. Hayes* was decided on June 26, 1974.[7]

## CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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*March 26, 1975*

**(Appendices Follow)**

7 The Ninth Circuit held that the hearing the trial judge provided petitioner later in the afternoon following his contempt conviction did not satisfy the demands of due process (App. B, at 11 fn. 9). Petitioner does not contest the correctness of that holding.